IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1355 OF 2005

Lingappa V. Lokare Mali
(since deceased through L.Rs.) ...Appellants

Vs.

Babu V.Lokare Mali
(since deceased through L.Rs.) ...Respondents

Mr.Satyajit A. Rajeshirke for the Appellants
Mr.N.J.Patil for the Respondent Nos.1-a to 1-d and 2

CORAM: A.S.OKA, J.
DATED: APRIL 10,2006.

P.C.:

1. Heard the Advocates for the parties. The Second Appeal is preferred by the legal representatives of the original Plaintiff. The original Plaintiff filed a suit against the Respondents-Defendants for possession and for mesne profits. The Plaintiff placed reliance on certificate under Section 32-M issued in his name under the provisions of Bombay Tenancy and Agricultural Lands Act,1948. The Plaintiff has also placed reliance on the alleged will executed by his father Vithoba on 29th November 1971. The Trial Court dismissed the suit filed by the Appellants. However, the trial court purported to allow the counter claim filed by the defendant Nos.1 and 2. An Appeal was preferred by the Appellants to the District Court. The Appeal has been dismissed by the impugned Judgment and Decree. However, the

learned Additional District Judge held that as the Defendant Nos. 1 and 2 did not file any counter claim for partition, the Trial Court committed an error by passing the decree in counter claim and by directing the Defendant Nos.1 and 2 to pay court fees.

2. The learned Advocate for the Appellants submitted that admittedly the certificate under Section 32M of the said Act of 1948 stands only in the name of plaintiff and therefore the Civil court could not have recorded a finding that the other members of the family are having share in the property which is subject matter of the certificate under section 32M. He submitted that the Courts below have not discarded the evidence of attesting witness examined by the Appellants and in fact the finding is that the evidence of the attesting witness is acceptable. He, therefore, submitted that a clear substantial question of law arises in this Second Appeal.

3. I have considered the submissions. In so far as the certificate under section 32M is concerned, it appears from the record that in the proceedings under the said Act of 1948, the original Plaintiff has acted as a Constituted Attorney of his father. The Appellate Court has recorded a finding that it was agreed between the parties to make proportionate contribution towards the payment of purchase price of the property acquired under the said certificate.

The Appellate Court also found that the respondent Nos.1 and 2 paid the price payable as per their respective shares. If these are the findings of fact, no interference can be made with the conclusion drawn by the Courts below that the certificate under section 32M does not confer exclusive title on the original Plaintiff.

4. So far as the execution of the will is concerned, the Appellate Court has recorded a finding that the original Plaintiff admitted that at the time of execution of will, his father Vithoba was 80 years old and was not keeping good health. The Appellate Court noted that the according to the case of the Respondents, Vithoba had suffered paralytic stroke and he was not in a position to speak. The Appellate Court noted that the said Vithoba died five days after the execution of the alleged will.

5. The Appellate Court has also noted one more circumstance which is very important. The original Plaintiff’s sister filed a suit for partition of the suit lands in the year 1990. In the said suit, the Plaintiff and his mother filed consent purshis admitting the share of the Plaintiff’s sister. In the said suit the Plaintiff did not rely upon the will which was allegedly executed on 29th November 1971. The Appellate Court has also noted that from the year 1971 till the date of filing the suit by the original Plaintiff in the

year 1987 he did not choose to rely upon the alleged will. These are the circumstances which are considered by the Appellate Court for discarding the case of the Appellant regarding execution of the will.

6. The findings recorded by the courts below against the original Appellant on the issue of the will are based on appreciation of oral and documentary evidence on record. There is no perversity in the said findings. No interference is called for. Hence, Second Appeal is dismissed with no order as to costs.

Judge.